Lim Boon Kiak v Affin Bank Bhd (formerly known as BSN Commercial Bank (M) Bhd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-03(IM)-163–10 OF 2012
RAMLY ALI, MAH WENG KWAI AND DAVID WONG JJCA
22 FEBRUARY 2013

Civil Procedure — Judgments and orders — Judgment in default — Setting aside — Service of creditor's petition — Petition served on solicitors — Whether solicitors had authority to accept service of documents — Bankruptcy Rules 1969 rr 109 & 110

This was an appeal against the High Court's decision in dismissing the appellant's appeal against the deputy registrar where the deputy registrar had dismissed his application to set aside the service of his creditor's petition and granted the adjudication order and receiving order ('AORO'). The issues that were raised for the court's determination were whether the service of the creditor's petition was not effected personally on the appellant as the judgment debtor ('JD') but was served on the solicitors; and whether the judgment in default was a final judgment as it was contended that an application to set aside the said judgment was filed at the sessions court within time and the application was still pending. In opposing the appeal, the respondent submitted that the service was regular in law despite the fact that the creditor's petition was only served by post on the appellant's solicitors; and that the appellant only filed his application to set aside the service of the creditor's petition after the AORO was granted against him.

Held, allowing the appeal with costs:

(1) Substituted service could only be effected with leave of the court. The creditor's petition against a JD could not be served by any other means. It could not be served on a firm of solicitors unless there was a clear indication in writing that the said firm had the authority to accept service of the documents on behalf of the JD. The said creditor's petition was served on the appellant's solicitor but there was no indication to show that the said solicitor had the authority to accept service of the creditor's petition on behalf of the JD. Service of the creditor's petition on the JD was bad for failure to comply with rr 109 and 110 of the Bankruptcy Rules 1969 ('Rules') and was not a mere irregularity which could be cured (see paras 12–16).

(2) Before a JD could exercise his right to object or to challenge the creditor's

petition within the time stipulated, the creditor's petition must first have been served effectively on him as provided under rr 109 or 110 of the Rules. If the service is bad, as in the present case, the issue of raising any objection on the petition would not arise (see para 17).

(3) The appellant had merit in his application to set aside the judgment in default on which the respondent based its bankruptcy notice and the creditor's petition. The appellant did not know of the judgment in default obtained by the respondent and after finding out about it, the appellant had filed an application at the sessions court to set aside the said judgment in default. The notice of demand on the amount claimed from the respondent's solicitors, the appellant did not receive any writ and statement of claim on the said sum issued by the sessions court (see para 18).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi dalam menolak rayuan perayu terhadap timbalan pendaftar di mana timbalan pendaftar telah menolak permohonannya untuk menegetepikan penyerahan petisyen pemiutangnya dan membenarkan perintah penghakiman dan perintah penerimaan ('PPPP'). Isu-isu yang dibangkitkan untuk penentuan mahkamah adalah sama ada penyerahan petisyen pemiutang tidak menjejaskan secara peribadi ke atas perayu sebagai penghutang penghakiman ('PP') tetapi diserahkan ke atas peguamcara; dan sama ada penghakiman ingkar adalah penghakiman terakhir kerana ia dihujahkan bahawa permohonan untuk mengetepikan penghakiman tersebut difailkan di mahkamah sesyen dalam masa dan permohonan masih belum didengar. Dalam menentang rayuan tersebut, responden berhujah bahawa penyerahan adalah biasa dari segi undang-undang meskipun fakta bahawa petisyen pemiutang hanya diserahkan melalui pos ke atas peguamcara perayu; dan bahawa perayu hanya memfailkan permohonannya untuk mengetepikan penyerahan petisyen pemiutang selepas PPPP dibenarkan terhadapnya.

Diputuskan, menolak rayuan dengan kos:

(1) Penyerahan ganti hanya boleh dilaksanakan dengan izin mahkamah. Petisyen pemiutang terhadap PP tidak dapat diserahkan dengan apa-apa cara yang lain. Ia tidak dapat diserahkan ke atas firma peguamcara kecuali terdapat tanda yang jelas dalam tulisan bahawa firma tersebut mempunyai kuasa untuk menerima penyerahan dokumen-dokumen bagi pihak PP. Petisyen pemiutang tersebut diserahkan ke atas peguamcara perayu tetapi tiada tanda untuk menunjukkan bahawa peguamcara tersebut mempunyai kuasa untuk menerima penyerahan petisyen pemiutang bagi pihak PP. Penyerahan petisyen pemiutang ke atas PP adalah tidak betul kerana gagal untuk mematuhi kk 109 dan 110

Kaedah-Kaedah Kebankrapan 1969 ('Kaedah-Kaedah') dan bukan semata-mata salah aturan yang boleh diperbetulkan (lihat perenggan 12).

(2) Sebelum PP dapat melaksanakan haknya untuk membantah atau mencabar petisyen pemiutang dalam masa yang ditetapkan, petisyen pemiutang mesti diserahkan terdahulu secara efektif ke atasnya seperti yang diperuntukkan di bawah kk 109 atau 110 Kaedah-Kaedah. Jika penyerahan adalah tidak betul, seperti dalam kes ini, isu membangkitkan apa-apa bantahan ke atas petisyen tidak akan berbangkit (lihat perenggan 17).

(3) Perayu mempunyai merit dalam permohonannya untuk mengetepikan penghakiman ingkar atas mana responden dasarkan notis kebankrapannya dan petisyen pemiutang. Perayu tidak mengetahui mengenai penghakiman ingkar yang diperolehi oleh responden dan selepas mengetahui tentangnya, perayu memfailkan permohonan di mahkamah sesyen untuk mengetepikan penghakiman ingkar tersebut. Notis tuntutan ke atas jumlah yang dituntut daripada peguamcara responden, perayu tidak menerima apa-apa writ dan pernyataan tuntutan ke atas jumlah tersebut yang dikeluarkan oleh mahkamah sesyen (lihat perenggan 18).]

Notes

For cases on judgment in default, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 4907–4922.

Legislation referred to

Bankruptcy Rules 1969 rr 109, 110, 117

Appeal from: Bankruptcy No 29–1293 of 2010 (High Court, Johor Bahru)

Wong Kai Fen (Tan Hee Soon, Wong & Co) for the appellant.
Mohd Fairuz Mahmood (Mohd Akhir & Partners) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

[1] The appeal before us is against the decision of the learned judicial commissioner (dated 12 September 2012) dismissing the appellant's appeal against the decision of the learned deputy registrar (dated 26 Jun 2012) where the learned deputy registrar had dismissed his application to set aside the service of the creditor's petition and granted the adjudication order and receiving order ('AORO') dated 15 September 2011 against him.

BRIEF FACTS

[2] The respondent, Affin Bank Bhd had on 30 September 2009 obtained a

judgment in default against the appellant. A bankruptcy notice was filed against the appellant on 29 April 2010 and was served on him by way of substituted service. Subsequently, a creditor's petition was filed on 12 November 2010; and an affidavit of service was affirmed on 25 March 2011.

[3] In respect of the judgment in default, the appellant had filed an application to set aside the said judgment at the sessions court. The said application is still pending.

[4] In respect of the creditor's petition, the appellant had filed an application before the learned deputy registrar (vide encl 20) to stay the execution of the said judgment in default. On 15 September 2011, the learned deputy registrar dismissed the stay application and proceeded to grant the AORO against the appellant.

[5] On 14 November 2011, the appellant filed an application to set aside the service of the creditor's petition and the AORO before the learned deputy registrar. However his application was dismissed by the learned deputy registrar. The appellant then filed an appeal before the learned judicial commissioner in chambers against the said decision of the learned deputy registrar. Again, the appeal was dismissed by the learned judicial commissioner. Then the appellant filed an appeal to the Court of Appeal against the decision of the learned judicial commissioner. Hence the present appeal before us.

AT THE COURT OF APPEAL

[6] Before us, learned counsel for the appellant raised two issues to support his appeal — namely:

(a) that the service of the creditor's petition was not effected personally on the appellant (as the judgment debtor) but was served on the solicitors in contravention of r 109 of the Bankruptcy Rules 1969; and

(b) that the judgment in default was not a final judgment on the ground that an application to set aside the said judgment was filed at the sessions court within time and the application is still pending.

On these two grounds the appellant submitted that the service of the creditor's petition and the AORO must be set aside.

[7] The respondent on the other hand contended that the service was regular in law despite the fact that the creditor's petition was only served by post to Tetuan Tan Hee Soon & Co on 23 March 2011 but not personally on the appellant. The respondent submitted that the appellant knew about the

petition and had not raised any objection on the issue of service. The respondent further claimed that the appellant only filed his application to set aside the service of the creditor's petition (on 14 November 2011) after the AORO was granted against him on 15 September 2011.

[8] The learned judicial commissioner in dismissing the appellant's application ruled that the failure in complying with r 109 of the Bankruptcy Rules 1969, by not serving the creditor's petition personally on the appellant was just a mere irregularity as the appellant had not raised any objection earlier; and the objection was only raised after the AORO was granted. It was further indicated by the learned judicial commissioner that the appellant was not prejudiced and the AORO granted was regular in law.

OUR FINDINGS

[9] Bankruptcy proceedings have a serious penal effect on a judgment debtor. He may be adjudged a bankrupt and his personal liberties may be at stake until his bankruptcy is discharged. Therefore the process and procedure in the proceedings must comply with the relevant provisions of the bankruptcy rules; including on the issue of service of the relevant cause papers on the judgment debtor.

[10] Rule 109 of the Bankruptcy Rules 1969 provides as follows:

> 109 — Personal Service.
>
> A creditor's petition shall be personally served and the service shall be affected by an officer of the court or by the creditor or his solicitor or a person in their employment by delivering a sealed copy of the petition to the debtor

[11] Rule 110 of the same Rules, provides for service of the petition by way of substituted service. It reads:

> 110 Substituted service.
>
> (1) If the court is satisfied by affidavit or other evidence on oath that prompt personal service cannot be effected because the debtor is keeping out of the way to avoid service of the petition or any other legal process or for any other cause it may order substituted service to be effected in such manner as it thinks fit.
>
> (2) Where any such order has been carried out the petition shall be deemed to have been duly served on the debtor.

[12] Rule 109 makes it mandatory for the creditor's petition to be served *personally (kediri)* on the judgment debtor. The sealed copy of the petition must

be delivered personally to the debtor. In the event that prompt personal service cannot be effected, after attempts have been made, the only avenue left is to apply for substituted service as provided for under r 110. Substituted service can only be effected with leave of the court. With the clear provisions of the above rules, it is our view that the creditor's petition against a judgment debtor cannot be served by any other means. It cannot be served on a firm of solicitors, unless there is a clear indication (in writing) that the said firm of solicitors has the authority to accept service of the documents on behalf of the judgment debtor.

[13] In the present case, the affidavit of service by the respondent deposes that the said creditor's petition was served on 'Peguam cara Defendan iaitu Tetuan Tan Hee Soon & Co (Peguam bela dan Peguam cara) di alamat No 14–2 (2nd Floor) Jalan Harimau Taman Century Garden, 80250 Johor Bahru, Johor'. There is no indication to show that the said solicitor has the authority to accept service of the creditor's petition on behalf of the judgment debtor. The learned counsel for the respondent on being queried by the court could not produce any form of 'authority' authorising the said solicitors to accept service of the petition on behalf of the judgment debtor.

[14] The process server in her affidavit of service states that:

> Saya telah dimaklumkan oleh Plaintif bahawa Defendan di atas masih tinggal di alamat B10, Kg Baru Ban Foo, 81800 Ulu Tiram, Johor dan/atau No GM11, Lot 1356, Mukim Sungai Terap, 84000 Muar, Johor seperti mana alamat di dalam surat Perjanjian Pinjaman. Defendan juga telah tidak memaklumkan kepada pihak Plaintif sebarang pertukaran alamat yang baru. Oleh itu, saya percaya bahawa alamat tersebut adalah alamat terakhir Defendan.

[15] The averment by the process server clearly shows that she knew that the judgment debtor was staying at the given address (as stated in the relevant loan agreement) and believed that the said given address was the last known address of the judgment debtor. But, there is no indication to show that any attempt had been made to effect service personally on the judgment debtor at the said address. The appellant complained that the petition was not served personally on him and he had never authorised the solicitors Tetuan Tan Hee Soon & Co to accept service of the petition on his behalf.

[16] In the premise, we are of the view that the said service of the creditor's petition on the judgment debtor was bad for failure to comply with the relevant rules ie rr 109 and 110 of the Bankruptcy Rules 1969. It is fatal to the respondent's case. It is not a mere irregularity which can be cured.

[17] The respondent argued that the appellant cannot raise any objection on

A the service of the creditor's petition on the ground that any objection must be made within the stipulated time in accordance with r 117 of the Bankruptcy of Rules 1969. This argument in our view does not hold water at all. Our view is that before a judgment debtor can exercise his right to object or to challenge the creditor's petition within the time stipulated the creditor's petition must first B have been served effectively on him as provided for under rr 109 or 110. If the service is bad (as in the present case) the issue of raising any objection on the petition does not arise. A judgment debtor cannot be faulted for failure to raise objection within the stipulated time if the service of the creditor's petition is irregular and bad in law. Failure to serve the petition personally on the C judgment debtor will cause substantial injustice to him. He will not be able to exercise his right to object or to challenge the petition within the stipulated time, more so, as in the present case where the judgment debt was obtained by way of a judgment in default.

D **[18]** The appellant claimed that he did not know about the judgment in default (which was obtained by the respondent on 30 September 2009). After knowing about it the appellant had filed an application at the Sessions Court Johor Bahru to set aside the said judgment in default. The appellant also claimed that beside the notice of demand on the amount claimed from the E respondent's solicitors, he did not receive any writ and statement of claim on the said sum issued by the sessions court. He also claimed that he has merit in his application to set aside the judgment in defaultand that the respondent's claim against him was time barred. On this issue, we agree that the appellant has merit in his application to set aside the judgment in default on which the F respondent based its bankruptcy notice and the creditor's petition.

CONCLUSION

G **[19]** Based on the above consideration, we allow the appeal with costs of RM5,000 to the appellant. We set aside the order of the High Court. Consequently, we allow the appellant's application to set aside the creditor's petition as well as the AORO dated 15 September 2011. We also make an order that the deposit be refunded to the appellant.

H *Appeal allowed with costs.*

Reported by Afiq Mohamad Noor

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